# SUPREME COURT OF VICTORIA
## COURT OF APPEAL

S EAPCI 2022 0034
S EAPCI 2022 0038

**JULIAN TAYLOR** Applicant

v

**VICTORIAN INSTITUTE OF TEACHING** Respondent

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| **JUDGES:** | KAYE JA |
| **WHERE HELD:** | Melbourne |
| **DATE OF HEARING:** | Determined on the papers |
| **DATE OF JUDGMENT:** | 18 May 2023 |
| **MEDIUM NEUTRAL CITATION:** | [2023] VSCA 119 |
| **JUDGMENTS APPEALED FROM:** | [2022] VSC 184 (Judge Ginnane)<br>[2022] VSC 185 (Judge Ginnane) |

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ADMINISTRATIVE LAW – Procedural fairness – Applicant's registration as teacher cancelled after hearing by Panel of Victorian Institute of Teaching – Applicant not attend hearing – Application to trial division for review of decision – Application made 4 years and 8 months out of time – Application for extension of time refused – Applicant also made application to VCAT for review of Panel decision – Application for extension of time refused by VCAT – Appeal to Trial Division from decision of VCAT dismissed – Applications for leave to appeal the two decisions of trial judge – Applications refused.

*Education and Training Reform Act 2006*, Part 2.6, Division 12, sub-division 4; ss 2.6.55(1)(b), 2.6.55(2)(b); *Supreme Court Act 1986*, s 14C; *Supreme Court (General Civil Procedure) Rules 2015*, rr 56.02(3), 64.15(1), 64.15(2), 64.15(5), 64.15(5)(a)(iv).

*House v The King* (1936) 55 CLR 499; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

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**Counsel**

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| Applicant: | In person |
| Respondent: | Mr B Overend |

**Solicitors**

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| Applicant: | In person |
| Respondent: | In house counsel of the Victorian Institute of Teaching |

KAYE JA:

1 The applicant has applied for leave to appeal from the decisions of a trial judge of the Court in two proceedings, each of which concern a 31 August 2015 decision by a hearing panel (the 'Panel') of the Victorian Institute of Teaching ('VIT') to cancel the applicant's teaching registration.

2 On 14 July 2020, the applicant commenced proceeding S ECI 2020 3043 ('the judicial review proceeding') by which he sought judicial review of the decision of the VIT. On 14 April 2022, Ginnane J of the Trial Division dismissed the application by the applicant for an extension of time within which to bring that proceeding.[1] In appeal proceeding S EAPCI 2022 0034, the applicant seeks leave to appeal to the Court of Appeal from that decision.

3 By application dated 24 September 2019, the applicant also applied to the Victorian Civil and Administrative Tribunal ('VCAT') for a review of the decision made by the Panel of the VIT. On 3 December 2020, the Tribunal refused the applicant's application for an extension of time to commence that proceeding.[2] In proceeding S ECI 2020 04794, the applicant sought leave to appeal, from that decision, to the Trial Division of this Court. On 14 April 2022, Ginnane J delivered judgment dismissing the application for leave to appeal from the order made by VCAT.[3] In appeal proceeding S EAPCI 2022 0038, the applicant now seeks leave to appeal from that decision by Ginnane J.

4 The two applications for leave to appeal have been referred to me as a single judge of the Court of Appeal pursuant to r 64.15(1) of the *Supreme Court (General Civil Procedure) Rules 2015*. Rule 64.15(5) provides that upon referral by the Registrar, a single judge may, without oral hearing or at or after an oral hearing, by order determine an application for leave to appeal, or alternatively refer the application for determination by the Court of Appeal constituted by two or more judges of the appeal. Rule 64.15(2) provides that, upon such a referral, if the single Judge of Appeal considers it is necessary or desirable to have an oral hearing, the judge may direct there be such an oral hearing.

5 Having read the extensive application documents in each of the two matters that are before the Court, I do not consider it necessary or desirable to have an oral hearing in this matter. I consider that I am sufficiently well informed of the issues, that are sought to be raised by the applicant in each of the two applications for leave to appeal, in order to be able to determine whether leave ought to be granted in respect of either or both of them. In considering the matter, I have read the written cases, filed by the applicant in each matter, and, in addition, I have read three unsworn affidavits of the applicant, dated 10 June 2022, 4 July 2022, and 15 November 2022. Those documents each contain some arguments, advanced on behalf of the applicant, that are additional to those contained in his written cases.

### *Background to the decisions*

6 On 11 November 2005, the applicant made an application to VIT for registration as a teacher. On 25 January 2006, VIT granted the applicant provisional registration. In December 2007, the applicant applied for full registration, which was granted on 21 January 2008. On 6 August 2010, the applicant had left the teaching profession, and accordingly he ceased to be a Victorian registered teacher on that date. Subsequently, on 17 November 2011, the applicant

1 *Taylor v Victorian Institute of Teaching (No 1)* [2022] VSC 184 ('the judicial review decision').
2 *Taylor v Victorian Institute of Teaching* [2020] VCAT 1359 ('the VCAT decision').
3 *Taylor v Victorian Institute of Teaching (No 2)* [2022] VSC 185 ('the VCAT appeal decision').

applied for registration as a teacher. On 12 January 2012, that application was approved and the applicant was granted full registration under his previous registration number. The applicant subsequently renewed his registration in 2012, 2013 and 2014.

7 In June 2015, VIT was notified of concerns about the identity of a teacher registered in Victoria in the name of the applicant. VIT investigated to determine if the applicant had obtained his registration by fraud or misrepresentation. As a consequence, the matter was referred to a formal hearing to be heard under Part 2.6, Division 12, sub-division 4 of the *Education and Training Reform Act 2006* (the 'ETR Act').

8 On 30 July 2015, the applicant was sent a notice that the hearing would be held on 12 August 2015. By email dated 8 August 2015, the applicant requested a six-week adjournment of the hearing. The adjournment was not granted, and the hearing proceeded on 12 August 2015.

9 On 13 August 2015, the applicant was sent the written submissions made by VIT to the panel hearing on the previous day. The applicant was informed that, because he did not attend on 12 August, the Panel had decided to defer making any decision for seven days in order to provide him with the opportunity to respond to the submissions in writing. The applicant did not provide any written submissions, but he did seek more time. The Panel considered that the applicant had not provided a sufficient basis to justify such an extension of time, and accordingly proceeded to determine the matter.

10 On 31 August 2015, the Panel delivered its decisions and reasons. The Panel concluded that the applicant had obtained his registration by misrepresentation, and the Panel determined to cancel the applicant's registration from 31 August.

***The Panel's reasons***

11 In its written reasons, the Panel noted that the applicant had sought an adjournment on various grounds, including that he was ill. The Panel noted that the applicant had not provided any substantiating evidence of his illness, and consequently, it had concluded that the matter should proceed on 12 August 2015. The Panel further noted that, as a matter of fairness, it had determined that the applicant should be provided with an opportunity to read and respond to the submissions that had been made by VIT.

12 The Panel then referred in some detail to the evidence that had been put before it in respect of the allegations that the applicant had obtained registration as a teacher, first between 1 November 2005 and 30 June 2006, and subsequently between 1 July 2007 and 23 July 2015, 'fraudulently and by false representation'. The Panel concluded that the applicant had obtained his registration to teach on those dates fraudulently and by misrepresentation by:

- completing an application in a false name;
- failing to disclose his previous names;
- failing to disclose his findings of guilt and convictions for offences, including indictable, in Victoria and elsewhere; and
- providing a false identity document in support of his applications.

13 The Panel noted that its purpose was not to punish the applicant, but rather to protect the public. It referred to a passage in the judgment of Boddice J in *Board of Professional*

*Engineers of Queensland v Shirtcliffe*,[4] in which his Honour recited the principle that 'fraud unravels everything'. The Panel noted that the misrepresentations made by the applicant had denied VIT the capability to properly assess his suitability to teach when he made his application for registration. The Panel noted that it could not conceive of a benign explanation for those misrepresentations, and it considered it to be a reasonable inference that the applicant possessed 'serious character flaws', which suggested that he should not be placed in a position of authority or trust. It also considered that the applicant's conduct had the potential to bring the teaching profession into disrepute. Accordingly, pursuant to s 2.6.46 of the ETR Act, the Panel found that the applicant had obtained his registration by misrepresentation, and it determined that his registration should be cancelled.

***The criminal proceedings against applicant***

14 Following the decision by the Panel, police commenced an investigation. The applicant was arrested on 25 November 2015. He was granted bail on 13 September 2017. After a trial in the County Court, on 14 August 2018, he was convicted on four charges of using a false document (contrary to s 83A(4) of the *Crimes Act 1958*), one charge of perjury (contrary to s 314(1) of the *Crimes Act*), seven charges of obtaining a financial advantage by deception (contrary to s 82(1) of the *Crimes Act*) and one charge of making, using or supplying identification information (contrary to s 192B(1) of the *Crimes Act*). The applicant was sentenced to two years and 11 months' imprisonment with a non-parole period of two years and two months. Subsequently, his application to the Court of Appeal for leave to appeal against conviction and sentence was dismissed.[5]

15 Subsequently, the applicant's visa was cancelled, and after he completed his sentence, he was placed in immigration detention and was deported.

***The judicial review proceedings***

16 As I have mentioned, the applicant commenced the judicial review proceeding on 14 July 2020, which was some four years and eight months after the prescribed period of 60 days within which to commence such a proceeding. Order 56.02(3) of the Rules of the Supreme Court provides that the court shall not extend the time of the commencement of such proceedings 'except in special circumstances'.

17 In considering the application for such an extension of time, Ginnane J noted that the applicant had relied on his period in custody as an explanation for his delay in commencing the proceeding. His Honour concluded that he was not persuaded that the applicant could not have commenced a proceeding, at least during the 11 months while he was on bail. Accordingly, the applicant had not provided an adequate explanation for the delay.[6]

18 Ginnane J then considered the various grounds upon which the applicant sought judicial review of the decision of the Panel. His Honour concluded that the Panel's refusal of an adjournment to the applicant was not a denial of natural justice. In particular, the officers of VIT had made it clear to the applicant that he needed to substantiate the reasons why he sought an adjournment by providing appropriate evidence, which the applicant failed to do. Further, the Panel had given the applicant seven days to respond in writing to the submissions

4 [2014] QSC 179.
5 *Taylor v The Queen* [2019] VSCA 162.
6 Judicial review decision [21].

made by VIT, but he had chosen not to do so.[7]

19 His Honour then gave consideration to the other grounds sought to be relied on by the applicant. Having done so, he considered that the applicant had failed to establish that any of those points would have any real prospect of success, if the applicant were granted an extension of time.[8] The judge further considered that VIT was entitled to have any proceedings that the applicant intended to commence, to challenge his deregistration as a teacher, commence within a reasonable time.[9] In those circumstances, the judge concluded that no special circumstances had been established to justify an extension of time.[10]

***Proposed grounds of appeal – principles***

20 Section 14C of the *Supreme Court Act 1986* provides that the Court of Appeal may only grant an application for leave to appeal if it is satisfied 'that the appeal has a real prospect of success'. In *Kennedy v Shire of Campaspe*,[11] Whelan and Ferguson JJA explained that requirement in the following terms:

> Attention must be focussed on the words 'real prospect of success' used by the statute. Bearing that in mind, those words should be construed consistently with this Court's interpretation of s 63 of the *Civil Procedure Act*. That is, the Court may only grant leave where the appeal has a 'real' as opposed to a 'fanciful' chance of success. This also accords with the interpretation given to the same words in the UK *Civil Procedure Rules* relating to appeals.
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> Naturally, there will be some cases where the prospects of the appeal are strong, others where the prospects are weaker but it cannot be said that they are fanciful, and others where the prospects are fanciful. For the purposes of leave, it is only necessary to distinguish between those whose prospects are real and those whose prospects are fanciful. There is no bright line that divides the two. Nor is it useful to devise other categories using terminology deployed in other situations.[12]

21 As mentioned, the applicant was only entitled to an order extending the time within which to bring the judicial review proceedings, if he could establish that there were 'special circumstances' for doing so pursuant to Order 56.02(3) of the Rules. The decision of the judge, that the applicant had failed to establish such circumstances, was, by its nature, essentially discretionary. If the applicant were granted leave, he would only be able to succeed on an appeal from that decision, if he were able to identify an error of law in the exercise of that discretion.

22 In *House v The King*,[13] Dixon, Evatt and McTiernan JJ stated the principles which apply in an appeal against the exercise of a discretion in the following terms:

> The manner in which an appeal against an exercise of discretion should

7 Ibid [33].
8 Ibid [34]–[49].
9 Ibid [54].
10 Ibid [55].
11 [2015] VSCA 47.
12 Ibid [12]–[13].
13 (1936) 55 CLR 499.

> be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[14]

23 In the present case, the decision by the primary judge concerned a matter of practice. It is well established that an appellate court must exercise 'particular caution' in reviewing such a decision.[15]

24 Bearing those principles in mind, the question which I must determine is whether the applicant has a real — that is, not fanciful — prospect of success in establishing any of the proposed grounds of appeal upon which he seeks to rely.

***The proposed grounds of appeal***

25 In his amended application for leave to appeal, the applicant seeks to rely on 22 grounds.

26 At the outset, it may be noted that none of those grounds seek to impugn the conclusion by the judge that the applicant had failed to demonstrate that he had an adequate explanation for his delay of four years and eight months in commencing the judicial review proceedings.[16] Nor are any of the proposed grounds of appeal directed, specifically, to demonstrating that the judge, in some way, erred in concluding that the applicant had not established any point of law which would have any real prospect of success if he were granted an extension of time.[17]

27 The proposed grounds of appeal, with two possible exceptions (grounds 11 and 22), do not seek to contend there was any appellable error in the conclusion by the Panel that the applicant had obtained his registration as a teacher by misrepresentation, which was of such a nature that his registration should be cancelled. Rather, the proposed grounds of appeal are directed, in large measure to the processes before the Panel. As such, the grounds do not seek, directly, to impugn the conclusion by the judge on the issue of whether to grant the applicant an extension of time. Nevertheless, bearing in mind that the applicant is unrepresented, I shall treat those grounds as contending that the judge ought to have found that the processes before the Panel were such that the Panel's decision should be set aside.

14 Ibid [504]–[505].

15 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

16 Judicial review decision [21].

17 Ibid [49].

***Proposed grounds of appeal***

28 The proposed grounds of appeal are, in a number of respects, quite repetitive. In broad terms they may be grouped into some eight separate categories.

29 The first category of the grounds relates to a proposition, relied on by the applicant, that the Panel was in error in proceeding to hear and determine the matter before it before the criminal prosecution of the applicant had been undertaken and completed. There were eleven grounds which, in different ways, address that point (grounds 1, 4, 5, 7 to 10, 12, and 14 to 16). A number of them were based on the applicant's understanding of the decision of the High Court in *Ziems v The Prothonotary of the Supreme Court of New South Wales*.[18]

30 Without rehearsing each different way in which the applicant put his submissions, they were basically in the following terms. The applicant contends that the question of his fitness to remain registered could only be determined after all the 'admissible facts' had been put before the jury in a criminal court of law (grounds 1 and 4). The determination of that question by the Panel undermined the applicant's right to be presumed innocent (ground 5) and could be construed as 'targeted persecution' of the applicant. The Panel's decision should not have been made on evidence which resulted in his conviction in the criminal trial (grounds 7 and 8). The applicant's registration as a fully qualified professional could not constitute a financial advantage (grounds 9 and 10). The hearing by the Panel violated the applicant's right to be presumed innocent (ground 12). The hearing breached the principle stated in *Ziems* (grounds 1, 13). Only a jury can review evidence on which an indictable criminal offence may be established (ground 14, 15 and 16).

31 As noted, a number of those grounds were expressly based on the decision of the High Court in *Ziems*. The applicant's reliance on that case is, with respect, misconceived.

32 In *Ziems*, a barrister, who had been admitted to practice, was convicted of manslaughter arising from a collision between a vehicle driven by him and an oncoming motorcycle, as a result of which the rider of the motorcycle died. As a consequence of his conviction, the Prothonotary of the Supreme Court called on the barrister to show cause why his name should not be removed from the roll of barristers. The Full Court of the Supreme Court of New South Wales made an order directing his name be removed from the roll. On appeal the High Court, by majority, upheld the appeal of the barrister, and ordered that he be suspended from practice during the continuance of his term of imprisonment that had resulted from the manslaughter conviction.

33 In deciding the appeal, the members of the High Court each considered that it was necessary to take into account not only the fact of the appellant's conviction, but also the facts and circumstances of the accident, including the conduct of the appellant, and the fact that the appellant had been assaulted shortly before the accident, and which may have affected his capacity to drive his vehicle. At no point in the decision did the members of the High Court express its reasons in terms which would preclude, in an appropriate case, consideration of a matter by a professional disciplinary tribunal, before the conclusion of a criminal trial concerning the professional person in question.

34 Further, and relevantly in this case, the processes before the VIT Panel were commenced, and concluded, before the commencement of any criminal proceedings against the applicant. This was not a case in which criminal proceedings were current or pending, at the time at which the Panel commenced and undertook its consideration of the matter before it. In those

[18] (1957) 97 CLR 279 ('*Ziems*').

circumstances, the grounds of appeal sought to be relied on have no arguable prospects of success.

35 The second matter, raised by the proposed grounds of appeal, arises from ground 2, namely that 'the VIT panel unfairly denied the applicant's reasonable request for an adjournment of six weeks due to his disability …'. As I have noted, the primary judge concluded that it had not been demonstrated that it was reasonably arguable that the applicant had been denied natural justice. The officers of VIT had made it clear to the applicant that he needed to substantiate the reasons he relied on in seeking an adjournment by producing appropriate evidence, which the applicant declined to do.[19] In the present application for leave to appeal, the applicant has not demonstrated how it could be contended that the judge erred in that respect. In short, there was no basis upon which the applicant has demonstrated any possible appealable error by the judge in reaching that conclusion.

36 The third category of error, sought to be relied on, is contained in proposed ground 11, that the Panel erred in proceeding under the ETR Act rather than under the previous legislation, the *Victorian Institute of Teaching Act 2001*, which was in operation at the time in which the applicant originally applied for registration as a teacher. As the judge in his reasons correctly noted, cl 1.4.1 of sch 8 of the ETR Act provides that a teacher who was registered under the 2001 Act, immediately before its repeal, continued to be registered by VIT 'under and subject to' the ETR Act. At the time at which the Panel considered the matter that was before the applicant, it was the ETR Act, and not the 2001 legislation, that was in operation, and which applied to the proceedings before the Panel. Accordingly, there is no substance in this ground, and it is wholly without any prospect of success.

37 The fourth category of grounds, sought to be relied on, is contained in grounds 18 to 21, namely that the VIT 'without legal authority', contacted and obtained relevant details and information from the Department of Foreign Affairs and Trade, the Department of Immigration and Border Protection, the Victorian Registry of Births, Deaths and Marriages, and the Tasmanian Registry of Births, Death and Marriages. There is no explanation in the applicant's proposed grounds, in his written case or in unsworn and unaffirmed affidavits filed in the matter, why VIT was not legally entitled to obtain that material, and why it was 'illegally obtained' and wrongly therefore put before the Panel. The information obtained by the VIT was clearly relevant to the issue in question. There is no substance in any of these grounds.

38 The fifth point relied on by the applicant is contained in ground 17, namely that VIT 'wrongly believed the applicant was not qualified to teach and he had stolen the name of another individual and was teaching under a false name'. The ground further contends that that error would 'bias and prejudice' VIT and the Panel. The ground is without substance. By the information and evidence obtained by VIT, it was established before the Panel that the applicant had obtained his registration by misrepresentation, by: completing an application in a false name; failing to disclose his previous names; failing to disclose his previous findings of guilt and convictions; and providing a false identity document in support of his application. The material so obtained by VIT was clearly relevant to those issues and was material to establishing these conclusions reached by the Panel. Accordingly, ground 17 could not be upheld.

39 The sixth point relied on by the applicant is contained in ground 22, namely, that the Panel used the wrong test by applying the principles stated by Boddice J in *Shirtcliffe*. That proposition is based on a misconception of the manner in which the Panel reached its

[19] Judicial review reasons [33].

conclusion. The Panel noted that, in the case of fraud, a transaction may be avoided ab initio. By parity of reasoning, the Panel noted that in a case in which registration of the teacher is achieved by such misrepresentation, it is appropriate that the registration itself be cancelled. That line of reasoning was, in the circumstances, unimpeachable.

40 Finally, the applicant has, in general terms, in grounds 3 and 6, alleged that there were jurisdictional errors, errors of law, administrative errors, breaches of natural justice, and allegations of serious discrimination during and after the Panel hearing. Those allegations are expressed in general terms with no specificity. There is nothing which could substantiate either of the two grounds in question.

41 In those circumstances, for the reasons I have just discussed, none of the proposed grounds of appeal, sought to be relied on, have any arguable prospect of success. Accordingly, it must be concluded that the application by the applicant for leave to appeal the decision of Ginnane J in the judicial review proceedings is totally without merit for the purposes of Order 64.15(5)(a)(iv) of the *Supreme Court (General Civil Procedure) Rules 2015*.

## *THE VCAT APPEAL*

42 I turn, then, to the second application before this Court, which is an application for leave to appeal the decision of Ginnane J, by which his Honour, in turn, dismissed an application for leave to appeal from the order made by VCAT on 3 December 2020, refusing the applicant's application for an extension of time to commence proceedings in that tribunal.

43 To recapitulate, the decision of the Panel of VIT was made on 31 August 2015. Four years later, on 24 September 2019, the applicant applied to VCAT for a review of that decision.

44 Section 2.6.55(1)(b) of the ETR Act provides that a person may apply to VCAT for review of a determination, made under Divisions 12 and 13 of the Act, cancelling or suspending that person's registration as a teacher. Section 2.6.55(2)(b) provides that such an application must be made within three months after the day on which VIT gives notice of the determination to the person. The application by the applicant to VCAT, for an extension of that time, was made under s 126 of the *Victorian Civil and Administrative Tribunal Act 1998*, which provides that the Tribunal may extend any time limit fixed by or under an enabling enactment for the commencement of a proceeding.

### *The VCAT decision*

45 The members of the Tribunal, who heard the application for an extension of time, provided detailed reasons for refusing the application.[20] The Tribunal concluded, on the balance of probabilities, that the decision of the Panel was provided to the applicant by no later than 26 October 2015.[21] Accordingly, the applicant's application for review of that decision was submitted to VCAT some 42 months later than the time prescribed by the legislation.

46 The Tribunal then considered and rejected two propositions, advanced by the applicant. First, the applicant had contended that the decision was made under the 'wrong legal test', in that the Panel had reviewed his registration under the ETR Act, instead of the *Victorian Institute of Teaching Act 2001*. The Tribunal members rejected that submission.[22] For the reasons

20 [2020] VCAT 1359.
21 Ibid [16].
22 Ibid [20]-[24].

which I have already discussed, the Tribunal members' conclusion in that respect was correct. Secondly, the applicant had contended that the decision 'does not exist', because it was not signed by the three Panel members, but, instead, it was signed by the chairperson for and on behalf of the other two members. The Tribunal also (correctly) rejected that submission.[23]

47 The Tribunal then considered the reasons, advanced by the applicant, for his delay in instituting the appeal to VCAT. It concluded that the applicant had failed to demonstrate that there was an acceptable explanation for that delay.[24] It further concluded that the applicant had, in the interim, failed to put VIT on notice that he planned to challenge the decision of the Panel.[25]

48 The Tribunal was not satisfied that there was any prejudice to VIT if an extension of time were granted.[26] The Tribunal then considered the merits of the substantive application before VCAT. It concluded that it was 'hard to conceive' how the applicant could successfully contend that he had not misled VIT.[27] Further, in the criminal proceeding, the Court of Appeal had found that the applicant had displayed no remorse and had assessed his prospects of rehabilitation as being 'very poor'. In those circumstances, the applicant had not advanced any submissions, or provided any evidence, to suggest it was likely that the Tribunal would, on review, conclude that the preferable decision was other than to cancel his registration.[28] Accordingly, given the lack of merit in the application, the Tribunal declined to exercise the discretion to extend time for the applicant to commence the proceeding in VCAT.[29]

***The appeal to the Trial Division – decision of the judge***

49 As noted, the applicant then sought leave to appeal from that decision by VCAT to the Trial Division of this Court pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

50 In his reasons for rejecting the appeal, the judge commenced by noting that the applicant had not demonstrated that VCAT erred in finding that he had not established any adequate reasons for the delay in commencing the proceeding before VCAT.[30] The judge further noted that, in relation to the merits of the applicant's application, most of the questions of law, or proposed grounds of appeal, were not relevant to the review function of VCAT.[31] The judge further considered that there was no error in the reasoning of VCAT in determining that the proceeding, by the applicant before it, lacked any merit.[32] Accordingly, his Honour concluded that the applicant had not established that VCAT erred in the exercise of its discretion to refuse him an extension of time.[33] Consequently, the judge concluded that the applicant's application, for leave to appeal from the decision of the Tribunal, must be dismissed.

23 Ibid [27].
24 Ibid [43].
25 Ibid [51].
26 Ibid [60].
27 Ibid [96].
28 Ibid [90].
29 Ibid [102].
30 VCAT appeal decision, [23].
31 Ibid [25].
32 Ibid [27].
33 Ibid [35].

***Proposed grounds of appeal from the VCAT appeal decision***

51 In support of the application for leave to appeal from the decision of the primary judge, the applicant relies on some 24 grounds of appeal. All but three of those grounds are a repetition, verbatim, of 21 of the 22 grounds, relied on by the applicant, in support of the application for leave to appeal from the decision of the primary judge in the judicial review proceedings.

52 There are two principal problems with those 21 grounds. First, they are not directed to any conclusion, by the judge, that it had not been demonstrated that VCAT had arguably erred in determining, under s 126 of the Act, not to grant the applicant an extension of time within which to institute an appeal, to the Tribunal, from the decision of the VIT Panel. As I have already discussed, the large majority of those grounds seek to impugn the processes undertaken by VIT and, further or alternatively, by the Panel. They are not, in any form, directed to the decision of the judge. Indeed, they are not directed to the decision of VCAT. As the Tribunal members noted, s 51 of the *Victorian Civil and Administrative Tribunal Act* provides that, in exercising its review jurisdiction in respect of a decision, the Tribunal has 'all the functions of the decision-maker'. As such, it does not review the validity, or legality, of the decision made by the decision-maker, but, instead, exercises its jurisdiction, and decides the case, based on the material before it.[34] Thus, it was not to the point, before VCAT, for the applicant to seek to impugn the processes of the Panel or VIT. Further, and by way of repetition, none of the grounds identify any error in the decision of the primary judge, in dismissing the application for leave to appeal from the decision of VCAT.

53 Secondly, and in any event, for the reasons that I have already discussed, there is no substance in any of the 21 proposed grounds of appeal which are a repetition of the grounds, sought to be relied on, in the application for leave to appeal from the decision of the primary judge in the judicial review proceedings.

54 I turn, then, to the remaining three proposed grounds. The first such ground (ground 13) is that 'VCAT wrongly determined that the conviction confirmed the VIT hearing decision'. It was submitted that the applicant's conviction, on the seven charges, was 'wrongfully secured by relying on the unlawful VIT decision and faulty evidence', so that it could 'never satisfy the required standard of proof' to support the conviction.

55 There are a number of flaws in that line of reasoning. First, the Court of Appeal has dismissed the applicant's application for leave to appeal against his conviction.[35] Secondly, it was permissible for the Tribunal to have reference to the applicant's subsequent conviction.[36] Further, it is not apparent that the Tribunal did, in fact, determine that the conviction confirmed the decision of the Panel. Rather, in determining whether to grant an extension of time, the Tribunal members noted that the applicant would need to provide evidence, that would support a contention that he did not, in fact, mislead VIT in his application to be registered. In that connection, the Tribunal noted that the applicant had not sought to argue that the birth certificate, previously proffered by him, was true and correct, and he had not provided any explanation as to why he produced it, if not other than to conceal his previous history of criminal offending. It was in that connection that the Tribunal observed that, in light of the applicant's conviction, in the County Court, and the rejection of his appeal, it was 'hard to conceive' how the applicant' could successfully contend that he had not misled VIT.[37] That observation, by the Tribunal, was realistic and appropriate.

34 *Sisters Wind Farm Pty Ltd v Moyne Shire Council & Ors* [2012] VSC 324 [40].

35 *Taylor v The Queen* [2019] VSCA 162.

36 *Evidence Act 2008* s 92(1); cf *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587.

37 VCAT decision [84]-[86].

56 The second additional ground, relied on by the applicant, is ground 15, which is to the following effect:

> The VCAT did not do its due diligence and dismissed *Ziems* and the relevant sections of the ETRA 2006 when reviewing the VIT decision on the applicant's matter.

57 For the reasons which I have already discussed, *Ziems* did not preclude VIT and the Panel proceeding to inquire into, and reach a decision about, the registration of the applicant as a teacher. Nor did the decision in *Ziems*, or any other associated legal principle, preclude or affect the decision made by VCAT. Accordingly, there is no substance in ground 15.

58 Finally, ground 19 of the proposed grounds is to the following effect:

> The VCAT made a procedural error in choosing to ignore the fact that the VIT investigator, Mr Stewart Williams (Mr Williams) wrongly believed the Applicant was not qualified to teach and he had stolen the name of another individual and was teaching under a false name. This error would clearly bias and prejudice the VIT and the Panel against the Applicant in the hearing.

59 That additional ground is, equally, without substance. First, there is no evidence as to the belief of Mr Williams, or as to whether any belief held by him was correct or otherwise. Secondly, and more relevantly, the Panel did not rely on any evidence given by Mr Williams. Thirdly, as just discussed, the issue as to whether Mr Williams had a true or incorrect belief was irrelevant, to the decision by VCAT, to refuse an extension of time. That decision was made on the basis that the applicant had engaged in considerable delay, had not proffered an appropriate explanation for that delay, and that his case lacked any merit in any event.

60 For those reasons, the applicant has not proffered any basis upon which to support any of the 24 proposed grounds of appeal. It follows, that the application for leave to appeal from the decision of the judge, in the VCAT appeal proceeding, is totally without merit.

### *Conclusion*

61 For the reasons that I have discussed, each of the two application for leave to appeal are totally without merit, pursuant to Order 64.15(5)(a)(iv) of the Rules. Each application must, therefore, be refused.

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